93-401

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALABAMA,

PETITIONER - APPELLEE,

V.

WILLIAM PELHAM BROWNING,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[28 U.S.C. §2254 PROCEEDINGS]

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court exceeded its scope of review in federal habeas corpus and granting relief on a non-federal constitutional issue, thus violating Beck v. Washington, 369 U.S. 541 where it granted habeas relief because the Alabama Court of Criminal Appeals had misapplied state law in determining that the prosecution did not have the burden of proof to exclude certain types of non-marijuana plant material when it sought to prove that Respondent possessed over 2.2 lbs of marijuana in violation of the state trafficking statute?

II. Whether the District Court misapplied Jackson v. Virginia, 443 U.S. 307, to grant habeas relief on the claim that the State's evidence was insufficient to sustain the trafficking conviction, where the State clearly established that Respondent possessed 4.8 lbs of marijuana plant material and where the alleged insufficiency was the failure of the prosecution

to disprove an affirmative defense based upon the fact that some plant material might have been excludable upon a proper showing of proof.

THE PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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OPINIONS BELOW

1. The original opinion of the United States Circuit Court of Appeals for the Eleventh Circuit affirming the granting of the writ is non-published, see Appendix "C".

The Recommendation of the Magistrate Judge and the Order of the District Court are contained in the attached Appendix "B".

The State court's opinion affirming Respondent's conviction is reported as Browning v. State, 549 So.2d 548 (Ala. Cr. App. 1989).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit which is sought to be reviewed was rendered on June 2, 1993. This Court has jurisdiction under 28 U.S.C. §1254(1), as amended (by Public law 100-352) on June 27, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in pertinent part)

"No person ... shall be deprived of life, liberty or property, without due process of law" made applicable to the states through the XIV Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

§20-2-80, Code of Alabama (1975)

Appendix "A"

§20-2-2(15), Code of Alabama (1975)

Appendix "A"

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On November 29, 1987, Respondent William Pelham Browning was indicted by the Grand Jury of Baldwin County, Alabama, for the crime of trafficking in marijuana, in violation of

§20-2-80, Code of Alabama (1975).[1] On April 7, 1988, a jury returned a verdict of guilty as charged and he was sentenced to twelve (12) years in the state penitentiary.

The conviction was affirmed on appeal by the Alabama Court of Criminal Appeals in a written opinion. Browning v. State, 549 So.2d 548 (Ala. Cr. App. 1989). His petition for writ of certiorari to the Alabama Supreme Court was denied on August 25, 1989.

Respondent filed this federal habeas corpus petition on May 5, 1991, in the United States District Court for the Southern District of Alabama. On March 13, 1992, Magistrate Judge William Cassady recommended that the writ be granted. That Recommendation was adopted by the District Court on April 30, 1992.

On June 2, 1993, the United States Court of Appeals for the Eleventh Circuit affirmed the

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[1]That statute is now codified at §13A-12-231, Code of Alabama. Appendix "A".

District Court's Order granting the writ in an unpublished per curiam opinion.

STATEMENT OF THE FACTS

In the early morning hours of Sunday, June 28, 1987, Richard Bryars, a deputy sheriff of Baldwin County, Alabama, concealed himself in the woods near the Respondent's house. He observed one Clinton Tolbert drive up and enter the defendant's residence. A few minutes, Tolbert and the Respondent emerged from the residence carrying an ice cooler which was then placed in Tolbert's car. Tolbert then drove to the home of Gordon Dixon, a Baldwin County deputy sheriff who was working undercover and posing as a buyer of marijuana. Dixon and Tolbert transferred the ice cooler to Dixon's car. Dixon opened the cooler and observed five (5) large zip-lock bags containing green plant material. The five bags were contained inside a large green plastic garbage bag. Officer Dixon and Tolbert then proceeded to leave in Dixon's car and they were later stopped by other

officers. The ice cooler and its contents were seized. Respondent's fingerprints were found on four of the five individual zip-lock bags and his fingerprint was found on the large garbage bag containing all of the zip-lock bags. The total weight of the green plant material, later identified as marijuana, constituted 4.845 lbs.

Respondent was convicted of trafficking in marijuana under §20-2-80 for possessing and selling marijuana in an amount that exceeded 2.2 lbs. as required by statute. [See Appendix "A"]

On appeal to the Alabama Court of Criminal Appeals, Respondent argued that the prosecution had failed to prove that he possessed 2.2 lbs. of "marijuana" as defined by the Alabama Supreme Court's interpretation of §20-2-80 contained in Ex Parte Bohannon, 564 So.2d 854 (Ala. 1988). In Ex Parte Bohannon, the Court had held that marijuana stalks and sterilized seeds incapable of germination had to be excluded from the total weight of the plant material before the amount of statutory "marijuana" could be determined. Respondent argued that the prosecution had

failed to show that all of the 4.8 lbs of plant material was marijuana because it had failed to exclude the stalks and seeds from the total weight of the plant material. He thus argued that it was impossible to determine from the State's evidence that he had possessed in excess of 2.2 lbs of marijuana as defined by statute.

The Alabama Court of Criminal Appeals affirmed the Respondent's conviction. Browning v. State, 549 So.2d 548 (Ala. Cr. App. 1989). That Court held that since the criminalist testified that the plant material was marijuana instead of testifying that the plant material contained marijuana, the State's evidence was sufficient to satisfy the requirements of Ex Parte Bohannon, Id. The Court further held that since the criminalist testified that less than one percent (1%) of the microscopic fragments found in plant material was non-marijuana, the State had properly proved that Respondent possessed in excess of the statutorily required amount of 2.2 lbs. The Court held that even though the prosecution had failed to show that

the seeds had been tested for germination, the burden had shifted to Respondent to prove that the seeds were excludable. The Court of Criminal Appeals' holding in Respondent's case was consistent with its construction of Ex Parte Bohannon in Day v. State, 539 So.2d 410 (Ala. Cr. App. 1988), a case decided prior to Respondent's case, and consistent with the Court's holding in Wright v. State, 570 So.2d 872 (Ala. Cr. App. 1990) which was decided subsequent to Respondent's case. Respondent's Petition for Writ of Certiorari to the Alabama Supreme Court was denied. However, subsequent to the decision in Respondent's case, the Alabama Supreme Court granted certiorari in Presley v. State, 587 So.2d 1022 (Ala. Cr. App. 1991) and there held that the Alabama Court of Criminal Appeals had been misapplying its Ex Parte Bohannon decision. The Alabama Supreme Court emphasized that the State had to prove that seeds were capable of germination before the seeds could be considered "marijuana" as defined by statute.

Respondent then filed his federal habeas corpus petition in the District Court which granted his request for relief. The District Court, on the basis of Ex Parte Presley, held that the Alabama Court of Criminal Appeals had misapplied the State's trafficking statute when it held that the prosecution had presented sufficient evidence to convict Respondent of trafficking in marijuana and that the burden had shifted to Respondent to prove the marijuana contained excludable matter. The District Court then held that Respondent was entitled to habeas relief on the ground that the evidence was insufficient to sustain the conviction of trafficking in marijuana under the standards of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2871, 61 L.Ed.2d 560 (1979). The Petitioners were ordered to resentence him for either felony or misdemeanor possession of marijuana or release him.

On appeal to the Circuit Court of Appeals for the Eleventh Circuit, the Petitioners argued that the question of whether the State had

satisfied the evidentiary requirements of the state statute to prove "marijuana" was a matter of state law. The Petitioners further argued that since the Alabama Court of Criminal Appeals had held that the prosecution's evidence satisfied Ex Parte Bohannon, that evidentiary finding was binding on the federal habeas corpus court, even if that ruling was incorrect as a matter of state law. Even if the Alabama Court of Criminal Appeals had misapplied Ex Parte Bohannon, it was outside the authority of the federal habeas court to correct the state appellate court on the interpretation of state law, especially where the State Supreme Court had the opportunity to review the ruling and declined to grant the petition for certiorari.

The Eleventh Circuit Court of Appeals affirmed the granting of the writ without opinion.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF THE FEDERAL DISTRICT COURT HAS EXCEEDED THE SCOPE OF FEDERAL HABEAS REVIEW AND HAS INTERVENED IN MATTERS OF STATE LAW, WHERE IT SOUGHT TO DETERMINE THAT THE ALABAMA COURT OF CRIMINAL APPEALS HAD MISAPPLIED STATE LAW AS DETERMINED BY THE STATE SUPREME COURT, AND HAS GRANTED RELIEF ON THE BASIS OF THAT ALLEGED MISAPPLICATION OF STATE LAW.

The basic question presented in this case is whether a federal habeas court which finds that a state court has misapplied state law can grant habeas relief in order to correct the error. As a corollary, but equally important question, is whether a federal habeas corpus court can grant relief on the ground of insufficiency of evidence under the authority of Jackson v. Virginia, 443 U.S. 207, 99 S.Ct. 2871, 61 L.Ed.2d 560 (1979), where the alleged insufficiency is not based upon a lack of evidence produced by the State, but is based upon a finding of that a lower state court has misinterpreted a higher state court's opinion regarding the burden of proof to exclude some

excludable plant material once the State had proved that Respondent possessed the amount of marijuana as required by the state statute.

The District Court's granting relief on the grounds that the state court misapplied its own law is clearly in violation of Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). In Beck, the Court stated:

> "...if we were to assume that Washington law requires such procedural safeguards, the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . ." Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100, 106, 64 L.ed. 476, 480, 80 S.Ct. 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

The Beck line of authority holding that erroneous interpretation of state law by state courts does not constitute a federal constitutional question was re-affirmed in Engle

v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) [footnote No. 21]:

> "We have long recognized that a "mere error of state law" is not a denial of due process. Gryger v. Burke, 334 U.S. 728, 731, 91 L.Ed.1682, 68 S.Ct. 1256 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." L.Ed.2d at 796.

Since the only facts to support the district court's granting of the writ was the finding that the Alabama Court of Criminal appeals had misapplied state law as defined by the State Supreme Court, the district court was issuing a writ on a question that did not involve federal constitutional law and thus, this granting of the writ is due to be reversed.

Although the district court attempted to cast this issue as an insufficiency of the evidence claim under Jackson v. Virginia, supra, this claim had nothing to do with a Jackson insufficiency claim since the State proved that Respondent was in possession of 4.8 lb of marijuana plant material while the state statute

only required 2.2 lbs. Instead, this was a "burden to disprove a negative" type of issue. The confusion in the Alabama Court of Criminal Appeals was not regarding the amount of marijuana that had to be proved, but rather which party had the duty to exclude any excludable plant material once the State had proved that Respondent possessed in excess of 2.2 lbs. The District Court treated the duty of the State to exclude the material as required by Ex Parte Bohannon as though it was an element of the offense rather than properly treating it as the equivalent of a burden to disprove an affirmative defense [the affirmative defense being that even if the Respondent possessed the marijuana plant material as alleged by Petitioners, he nevertheless was not criminal liable because the plant material was excludable from the statutory definition of marijuana].

This Court noted in Engle v. Issac, supra, that the mere fact that the prosecution is required to prove a fact does not automatically make that fact an element of the offense:

> "Our opinion suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare Mullaney v. Wilbur, supra, with Patterson v. New York, supra. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an "element" of the crime for one purpose, it must do so for all purposes." Id. at L.Ed.2d 795-796.

Since that statute defining trafficking did not, on its face, require the State to exclude any excludable matter and since that burden was placed on the State by the Alabama Supreme Court's interpretation of the statute, the question here is whether the Jackson v. Virginia requirement that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" is applicable where the State did prove the essential element

of the offense, namely that Respondent possessed in excess of 2.2 lbs of plant material containing marijuana, but failed to exclude any excludable matter.

CONCLUSION

It is obvious that the district court violated the rules of habeas corpus law as stated by this Court when it granted federal habeas relief merely because the State intermediate appellate court misapplied state law to Respondent's case and where the issue involved was not a federal constitutional issue.

Secondly, the district court misapplied Jackson v. Virginia because that case is applicable only where the State fails to present enough evidence from which a rational trier of

fact could find the essential elements of the crime. Clearly, a rational trier of fact could have found that the 4.8 lbs of plant material possessed by Respondent contained at least 2.2 lbs of marijuana as defined by state law.

Lastly, Respondent's habeas corpus claim should have been raised and decided under a different type of due process claims: that is, the district court should have limited its review to a question of whether the state trial court's failure to sustain his objection and to force the prosecution to exclude properly excludable material, if there was any, was so fundamentally unfair that deprived him of due process. E.g., Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Also CF. Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) ["absent a specific constitutional violation, federal

habeas corpus review of trial error is limited to whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process."]

Respectfully submitted,

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